

B & B Trucking, Inc. and B & B Trucking Inc. Employees Association. Case 7-CA-47022

August 19, 2005

DECISION AND ORDERBY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On May 27, 2005, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.²

¹ We adopt the judge's finding that the Respondent violated Sec. 8(a)(5) by failing to provide the Union with requested information on health care costs per employee. The Union requested information about how the Respondent's health care cost "broke down per person." The Respondent argued, for the first time in its reply brief, that it lawfully withheld this information because it contained confidential medical information of individual employees. The Respondent never raised or requested to bargain with the Union about its confidentiality concerns. Moreover, the Respondent did not except to the judge's unfair labor practice finding concerning its failure to furnish per-employee health care cost information. See Board's Rules and Regulations Sec. 102.46(g). Indeed, even if it had so excepted, the Respondent's confidentiality argument would not properly be before us, as it is outside the scope of the General Counsel's answering brief. *Id.* Sec. 102.46(h). Nevertheless, we interpret the Union's request as seeking only the Respondent's average health care cost per unit employee—data which would not implicate confidentiality concerns, much less the confidentiality concerns asserted by the Respondent for the first time in its reply brief.

The judge found, and we agree, that the Respondent, in violation of Sec. 8(a)(5), unilaterally implemented its proposal to offset a 20-cent-per-hour increase in fringe benefits with a corresponding decrease in wages. To remedy this unfair labor practice, paragraph 2(a) of the judge's recommended Order requires the Respondent to "[r]estore the 20-cent-per-hour benefit payment to employees from July 1, 2003, to such time as Respondent bargains in good faith over the issue with the Union," and paragraph 2(d) adds a standard make-whole remedy. The Respondent challenges paragraph 2(a), contending that its backpay liability is negligible or nonexistent in light of its commitment, made contemporaneously with the implementation of its proposal, not to pass on increased health insurance costs to employees until July 1, 2004. We express no view as to the merits of this contention, which relates to mitigation of the Respondent's backpay liability and therefore may be raised at compliance. However, we agree with the Respondent that the wording of paragraph 2(a) might be interpreted to preclude it from doing so, and we have modified that wording accordingly. As modified, paragraph 2(a) requires the Respondent to rescind its unilaterally implemented proposal. The make-whole remedy of paragraph 2(d) remains. Together, these provisions achieve the Board's remedial purpose of restoring the status quo that obtained prior to the unlawful unilateral change. See, e.g., *Larry Geweke Ford*, 344 NLRB No. 78, slip op. at 1-2 (2005).

² We amend the remedy section of the judge's decision to provide that backpay shall be calculated in accordance with *Ogle Protection*

ORDER

The National Labor Relations Board orders that the Respondent, B & B Trucking, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Dealing directly with employees and bypassing their collective-bargaining representative, the B & B Trucking Inc. Employees Association (the Union).

(b) Disparaging the Union, advising employees to change their representatives, and seeking to interfere in the Union's internal affairs.

(c) Delaying provision of and failing to provide relevant and necessary information requested by the Union concerning bargaining unit employees' health benefit costs.

(d) Refusing to bargain with the Union as the exclusive bargaining representative of its employees in the bargaining unit set forth below by unilaterally changing the open enrollment period for employee health benefits and unilaterally implementing a proposal to offset a 20-cent-increase in hourly fringe benefits with a corresponding decrease in wages.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilaterally implemented proposal to offset a 20-cent increase in hourly fringe benefits with a corresponding decrease in wages.

(b) Upon request of the Union, rescind the unilateral changes to the open enrollment period for employee health benefits.

(c) Provide to the Union the information it requested on July 17, 2003 regarding health benefit costs for bargaining unit employees.

(d) Make employees whole for any loss of earnings and other benefits suffered as a result of the unlawful actions taken against them in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in accor-

Service, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), rather than *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The *F. W. Woolworth* method of calculating backpay does not apply here because the violations found do not involve cessation or denial of employment. See, e.g., *CAB Associates*, 340 NLRB 1391, 1393 (2003).

In addition to the modification explained above in fn. 1, we have modified the judge's recommended Order (1) to reflect the appropriate method of calculating backpay as stated above, (2) to include an inadvertently omitted remedy for the Respondent's unlawful unilateral change to the open enrollment period for health benefits, and (3) to more closely conform to the Board's standard remedial language. We have also substituted a new notice to conform to the Order as modified.

dance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All regular full-time, new hire full-time, and regular part-time truck drivers of B & B Trucking, Inc.

(f) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Kalamazoo, Michigan, Ft. Wayne, Michigan, Detroit, Michigan, Chicago, Illinois, and Syracuse, New York facilities, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 2003.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY THE ORDER OF THE

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT deal directly with our employees and bypass their collective-bargaining representative, the B & B Trucking Inc. Employees Association (the Union).

WE WILL NOT disparage the Union, advise our employees to change their representatives, or seek to interfere in the Union's internal affairs.

WE WILL NOT delay provision of or fail to provide relevant and necessary information requested by the Union concerning our employees' health benefit costs.

WE WILL NOT refuse to bargain with the Union as the exclusive bargaining representative of our employees, in the bargaining unit set forth below, by unilaterally changing the open enrollment period for employee health benefits and unilaterally implementing a proposal to offset a 20-cent increase in hourly fringe benefits with a corresponding decrease in wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind our unilaterally implemented proposal to offset a 20-cent increase in hourly fringe benefits with a corresponding decrease in wages.

WE WILL, upon request of the Union, rescind our unilateral changes to the open enrollment period for employee health benefits.

WE WILL provide the Union with the information it requested on July 17, 2003 regarding health benefit costs for our employees.

WE WILL make our employees whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful actions taken by us.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All regular full-time, new hire full-time, and regular part-time truck drivers of B & B Trucking, Inc.

B & B TRUCKING, INC.

Steven E. Carlson, Esq., for the General Counsel.

Richard A. Hooker, Esq., for the Respondent.

James Brumfield, Rep., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on June 23 and 24, 2004, in Kalamazoo, Michigan. The complaint alleges Respondent violated Section 8(a)(1) and (5) of the Act by dealing directly with bargaining unit employees represented by the Charging Party. The complaint also alleges Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide relevant and necessary information to the Charging Party Union. In addition, the complaint alleges Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a change in employees' wages and benefits, as well as a change in the health care benefits, without notifying the Union or affording the Union an opportunity to bargain with respect to the changes and their effects. Finally, the complaint alleges Respondent violated Section 8(a)(1) of the Act by interfering in the Union's internal ratification vote procedures, criticizing the Union and encouraging employees to change their representative and to adopt changes in the Union's internal rules and structure. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Kalamazoo, Michigan, where it is engaged in the interstate transportation of United States mail, under various contracts with the United States Postal Service (USPS). During a representative 1-year period, Respondent provided services valued in excess of \$50,000 directly to the United States Postal Service for the interstate transportation of mail. The United States Postal Service is directly engaged in interstate commerce. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent's business is primarily that of a carrier of United States mail. Under approximately 30 "route contracts," Respondent transports mail between designated cities. Each inter-city route is the subject of a separate contract between Respondent and the USPS. These contracts are bid at various intervals. They normally have durations of 4 years, but they expire on various dates. Respondent's main terminal is at Kalamazoo, but it also has smaller terminals at Ft. Wayne, Michigan, Detroit, Michigan, Chicago, Illinois, Syracuse, New York, and Sarasota, Florida. There are about 115 drivers based at these locations. Respondent employs about 150 employees altogether. Nonbargaining unit employees include mechanics, office staff, supervisors, and managers.

Terry Keller is the president of respondent, Teresa Porter is the chief operations officer, Tom Rollins is the human resources director, and Jennifer Blackburn is the finance director. In addition, Tom Cole, a management consultant, assists Respondent with various aspects of its business. All are admitted agents of Respondent, and all except Cole are admitted supervisors.

B & B Trucking Inc. Employees Association (the Union) has been the representative of the driver employees of Respondent since 1969. The Union is a small independent union made up solely of driver employees of Respondent. It has no office, no paid officers, no paid staff, and no dues. The officers are elected at irregular intervals by the driver employees. The Union's president at the time of the events in question was James Brumfield.

The current collective-bargaining agreement was signed on April 11, 2000, and was revised on August 2, 2002. It is effective through July 1, 2005. It includes an annual reopener provision for July 1 of each year for the renegotiation of benefits. The route contracts are subject to the Service Contract Act, and periodically the United States Department of Labor issues a "wage determination," which specifies the minimum amount the drivers in a particular region must be paid hourly. The amount is allocated to wages as well as to other benefits. Subsequent to the issuance of wage determinations, it has been usual for the Employer and the Union to negotiate, using the wage determination as a base. In order for any increase in wages or fringe benefits to become paid to the Employer, the parties must submit their collective-bargaining agreement to the Department of Labor. After submission to the Department of Labor and the Postal Service, the new rates are incorporated into the route contracts.

For a year or more preceding June 30, 2003, Respondent had been a self-insurer for medical and health care costs. Respondent found that being a self-insurer was unpredictable and expensive. For the period beginning July 1, 2003, Respondent decided to purchase health care insurance from Blue Cross/Blue Shield of Michigan. Respondent's decision to change from self-insured status to the use of Blue Cross/Blue Shield health care insurance is not in issue herein.

2. Events surrounding the 2003 contract reopener negotiations

In March 2003, the Department of Labor issued a wage determination for the drivers in the Michigan area, increasing the fringe benefit rate by 20-cents-per-hour.¹ The parties met on June 9, 2003,² pursuant to the July 1 contract reopener, to negotiate. Under the parties' collective-bargaining agreement, the fringe benefit amount was paid directly to the drivers in their paychecks. The drivers were responsible for paying a portion of their health care premiums and contributing to a 401(k) plan. On June 9, Respondent proposed that the increase of 20 cents be retained by Respondent in order to offset what it said were increased health care costs. Respondent stated that if the Union agreed to this arrangement, it would "not consider changing plan coverage or increasing employee contributions without employee agreement" for a year. The Union wanted to consult with the drivers about the proposal, and proceeded to poll them on the issue.

Respondent, meanwhile, sent a notice in late June to the drivers describing Respondent's proposal and asserting that it expected to spend \$400,000 on health care costs during 2003.

On July 17, the Union sent a letter to Respondent requesting information on Respondent's asserted costs for health care, and requested that the costs be "broken down per person." Brumfield testified that the Union wanted to see how much of the Respondent's claimed health care costs were being spent for bargaining unit employees. He further testified that the drivers were concerned as to whether their contributions were going to be used to subsidize the health care costs for nonbargaining unit employees. No response to the Union's request for information was received for 5 weeks.

On July 25, Respondent sent ballots to the drivers along with a notice from Keller telling them that Respondent's proposal to retain the 20-cent fringe benefit increase would be effective unless a *majority of the drivers* rejected it using the enclosed ballot within the next 6 days. The Union sent a letter to Respondent on August 1 objecting to its direct solicitation of employees' votes on the issue, stating that the parties were still negotiating, and that the Union was waiting for a response to its information request. The Union stated to Respondent that its actions were undermining the Union as bargaining representative. Again, Respondent made no response to the Union.

Respondent did, however, communicate directly with employees again, mandating their attendance at meetings held by Respondent to explain its proposal to retain the 20-cent fringe benefit increase.

Respondent and the Union met for bargaining on August 22. During that meeting, Respondent's financial officer, Blackburn, showed the union representatives certain documents concerning Respondent's health care costs. These documents consisted of certain summaries of benefit costs in the form of charts. According to the testimony of Respondent's witness Blackburn, she had

made these calculations in May. Respondent offered no explanation for not providing these documents to the Union in response to its July 17 information request. The summaries of Respondent's benefit costs did not break down the health care costs of Respondent by bargaining unit, and nonbargaining unit costs, but only on a companywide basis. The information shown to the Union would not enable it to calculate average per person costs, especially in light of the fact that some employees were on a single person health plan, while others had family coverage. Blackburn testified that Respondent had the information necessary to derive such averages and per person costs, but she admitted that Respondent had never provided the information to the Union. Another ambiguity in the information shown to the Union on August 22 derived from the fact that much of it was based on Respondent's past experience with its self-insured plan. This information was therefore of little or no value in evaluating Respondent's costs under the Blue Cross/Blue Shield plan which was then in effect.

It is undisputed that the Union requested that Respondent provide the Union with copies of the Blue Cross/Blue Shield billing statements concerning health insurance, and that these were not provided to the Union until April 16, 2004. The first of these statements became available to Respondent at least by August 12, 2003.

In late September, the Union sought input from the bargaining unit employees concerning Respondent's proposed health care benefits change, and learned that the majority of drivers opposed the change. Brumfield, the Union's president, informed Rollins of the drivers' opposition to the change, and requested another bargaining meeting. The requested meeting never took place. On October 24, Respondent announced that it had implemented its proposed health benefits change. Rollins testified that Respondent believed, on the basis of its own polling of employees and subsequent meetings with employees, that a majority of the employees favored Respondent's proposal.

Respondent claims that it believed it was at impasse with the Union over the benefits issue on October 24. Respondent admits, however, that it made the decision to implement the benefits change in August. Respondent also decided to change the health insurance enrollment "open" period from January to July, with one additional "open" period in September 2003. This change was announced by Respondent on August 27. Respondent admits that it did not notify the Union of this change in advance of announcing and implementing the change.

Thereafter, on December 3, Respondent sent letters to employees in which it stated that meetings would be held to discuss the "election of future driver representatives," and the possibility of "instituting a set of by-laws outlining election procedures, term limits, voting rights and other formal policies" for the Union, and mentioning the possibility of a dues structure. The letter further implied that the employees' current union representatives did not have "the time, know-how, [and] tools" necessary to "reach agreement" with Respondent.

¹ The wage determination hourly fringe benefit rate had been \$2.68 per hour, and was raised in March 2003 to \$2.88 per hour. This would mean a weekly increase for each driver of \$8, as the fringe benefit payment is capped at 40 hours per week.

² All dates hereafter will be in 2003, unless otherwise specified.

B. Discussion and Analysis

1. Direct dealing, disparagement, and interference

It is well settled that an employer must deal with employees' collective-bargaining representative concerning wages, hours, and working conditions, and must not ignore or bypass the Union and deal directly with employees in a way which is likely to erode the union's position as exclusive representative. *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992). As was stated in that case, "going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions . . . plainly erodes the position of the designated representative." Furthermore, the proper functioning of the collective-bargaining system requires that employees' representatives be independent, able to advance employees' interests and to conduct arms-length bargaining with an employer. An employer may not interfere with a union's internal affairs and thereby attempt to interfere with or undermine its independence.

Respondent's polling of its employees in July and holding of meetings with them in early August clearly tended to undermine the Union's position as exclusive representative. Respondent was well aware that the Union itself was consulting with the employees over the proposed health benefits change. Respondent's conduct had exactly the ill effects foretold in *Allied-Signal*. Respondent relied on its own opinions of employee sentiment garnered from the poll and meetings as a self-justification for making its unilateral change. I find that Respondent's conduct in conducting a direct poll of employees and holding meetings with them to solicit their views on bargaining, especially while failing to provide the Union with information which it needed in order to continue bargaining about the proposal, certainly bypassed the Union and tended to undermine the Union. I find that Respondent's direct dealing with employees violated Section 8(a)(1) and (5) of the Act.

Respondent's course of conduct in treating the Union as a cipher continued in its arrogant December letter to employees proposing that they elect different union officers and draw up formal internal by-laws, with Respondent's help! Respondent's letter clearly implied that it intended to be involved in proposed meetings for these purposes. Respondent's proposed insertion of itself into the internal affairs of the Union violates a basic tenet of the collective-bargaining system, and violates Section 8(a)(1) of the Act. *Armored Transport, Inc.*, 339 NLRB 374 (2003).

2. Failure to provide information

The information requested by the Union concerned the Respondent's cost of providing health care benefits. It related solely to bargaining unit employees, and related directly to Respondent's bargaining proposal. Thus, under settled Board law, the requested information was presumptively relevant. By delaying providing any information at all for over 5 weeks, delaying other requested information (the Blue Cross/Blue Shield costs) for approximately 9 months, and never providing some requested information at all (the cost of health insurance for bargaining unit employees), Respondent certainly violated its duty to furnish necessary information to the Union. I find

that Respondent's conduct in failing to furnish information and delaying the furnishing of information to the Union violates Section 8(a)(5) of the Act. See, e.g., *V & S Schuler Engineering*, 332 NLRB 1243, 1244 (2000); *Beverly Health & Rehabilitation Services*, 328 NLRB 959, 963 (1999); *JRED Enterprises, Inc.*, 313 NLRB 1244 fns. 1 and 2 (1994).

3. Unilateral changes

Board law requires that during contract negotiations, an employer may not unilaterally implement changes or proposals unless the union agrees to the implementation, or the union has had notice of the changes and an opportunity to bargain about the subject. *Maple Grove Health Care*, 330 NLRB 775, 779 (2000). In the absence of agreement, an employer may implement its proposed changes only after a complete impasse in contract negotiations. In this case, the parties were actually engaged in bargaining about the proposal. Respondent prevented that bargaining from following its normal course by failing to provide necessary information to the Union and by dealing directly with employees. Respondent committed two unfair labor practices which directly impeded the normal progress of negotiations. Thus, no lawful impasse could have been reached. *Circuit-Wise, Inc.*, 309 NLRB 905, 918 (1992). Respondent actually made the decision to implement its benefits change in August, even before its alleged "impasse" with the Union on October 24. Respondent communicated its decision to the USPS, and the Department of Labor in accordance with its contract obligations, apparently leading those agencies to believe that Respondent already had the agreement of the Union to its proposal. Respondent did not inform the Union of the implementation of the benefits change until late October. In addition, Respondent changed the "open" enrollment periods for health benefits admittedly without notifying the Union and without affording the Union an opportunity to bargain about the enrollment periods. Both these actions constitute unlawful conduct by Respondent. I find that Respondent violated Section 8(a)(5) of the Act by unilaterally implementing changes in the health benefits reimbursement, and by unilaterally changing the enrollment periods for health insurance.

CONCLUSIONS OF LAW

1. By disparaging the Union, advising employees to change their representatives, and seeking to interfere in the Union's internal affairs, Respondent has undermined the Union and interfered with employees' Section 7 rights, and has violated Section 8(a)(1) of the Act.

2. By delaying provision of and failing to provide relevant and necessary information concerning bargaining unit employees health benefit costs, as requested by the Union, Respondent has violated Section 8(a)(5) and (1) of the Act.

3. By making changes to health benefit programs and pay unilaterally, without affording the Union notice or an opportunity to bargain about the changes, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By dealing directly with employees, and bypassing the Union, their collective-bargaining representative, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom, to provide the Union with the requested information concerning per person health benefit costs for bargaining unit employees, to rescind the unilateral changes to wages, and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall also recommend that Respondent be ordered to make whole all bargaining unit employees for any loss of earnings or

benefits they may have suffered due to the unlawful unilateral changes, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

[Recommended Order omitted from publication.]

³ The record evidence did not show whether the drivers at the Sarasota, Florida terminal of Respondent are a part of the bargaining unit. The General Counsel contends that this issue need not be determined in order to resolve the unfair labor practice issues herein. I agree. If the parties differ as to the scope of the bargaining unit, the proper course would be the filing of a petition for unit clarification.